SUPREME COURT, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1969

No. 599

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,
Appellant

versus

UNITED STATES OF AMERICA,
Appellee

Appeal from the United States District Court for the Eastern District of Louisiana

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Opinion Below

The opinion of the District Court, which has not been reported, is appended hereto at page 13 below.

Jurisdiction

This is a civil Government antitrust action brought under the Sherman Act (15 USC §1), in which the District Court has granted a partial final summary judgment under Rules 54(b) and 56, FRCP. The judgment is dated June 24, 1969, and was entered on the same date. This Court has jurisdiction of this appeal therefrom under 15 USC §29. See *United States vs Diebold, Inc.*, 369 US 654 (1962).

Question Presented

Whether a United States District Court may properly grant summary judgment where the motion, pleadings, and evidence before it raise genuine issues of disputed facts as to material allegations in the complaint.

Statement of the Case

This civil antitrust action was commenced by the United States in 1964, under §1 of the Sherman Act, 15 USC §1. The complaint contains several allegations of unlawful actions on the part of the defendant ("AGC"), which is a trade association of general contractors in the New Orleans area. The background facts relevant to the allegations pertinent to this appeal are: AGC's by-laws provide for payment of dues, subject to a fixed minimum annual amount, equal to a small percentage of the total contract price of all work obtained by the member in the greater New Orleans area; on occasional large projects, a smaller flat amount is fixed as dues. Pl. Ex. 1, Art. 6J; Pl. Ex. 17-20. During the period 1947-65, AGC had five successive contracts with M. M. Caraway Company; with some variations, these provided that at the request of a specified number of AGC members, Caraway would make a "quantity survey" (an estimate of the materials required) for any construction job in the greater New Orleans area; that the survey would be available to all AGC members; that Caraway could furnish copies of the survey to non-members of AGC; that Caraway's fee for making the survey would be paid by the contractor who obtained the job, if a member of AGC or if a non-member who used the survey; and that (in some of

the earlier contracts only), if that contractor was a non-member of AGC to whom Caraway had furnished a copy of the survey, Caraway's fee would be increased by an amount equal to the amount which would have been payable to AGC as dues had the successful bidder been a member of AGC. Pl. Ex. 3-7.

The Government does not charge any impropriety in the method of computation and payment of AGC dues, or in the fact that members are free to include the amount of these dues in their bids if they choose to do so. The Government could hardly take exception to these matters, since they were expressly declared lawful by a consent decree entered in a prior Government antitrust action against AGC in 1940. Def. Ex. 18.

The allegations here pertinent are the Government's charges that AGC and its members have engaged in a conspiracy consisting of a "continuing understanding and concert of action among" them, "the substantial terms of which" are (1) that each member should include in its bids the quantity survey fee and its AGC dues, and (2) that non-members "should be urged and induced to include" AGC dues in their bids, and, if successful in obtaining a contract, to pay such dues to AGC. Complaint, ¶15(a), (b) and (c).

The Government subsequently moved for partial summary judgment that (in the aspects here pertinent) (1) AGC, its members and non-member contractors "entered into agreements and understandings whereby members, as well as nonmembers, . . . included defendant's dues in their bid price", and (2) AGC and Caraway "entered into agree-

ments which resulted in members of the defendant including the quantity survey cost in their bid price".

The District Court granted this motion as to the stated aspects, and entered a partial final judgment perpetually enjoining AGC and its members "from, directly or indirectly, inducing or requiring members of the defendant, or nonmembers, to include in their bids on any building construction project in the New Orleans metropolitan area, any charges for: (a) quantity surveys; or (b) chapter dues." The judgment also required AGC to dissolve its Quantity Survey Committee, and enjoined it from forming any other committee to administer any program whereby AGC and its members agree among themselves or with anyone else to include quantity survey costs or AGC dues in bid prices. Appendix, p. 25, below.

In support of its motion for summary judgment, the Government relied on the successive quantity-survey contracts between AGC and Caraway, none of which required inclusion of quantity-survey costs in bids (Pl. Ex. 3-7); a letter from AGC's President to a non-member firm simply describing one of the Caraway contracts (Pl. Ex. 8); a letter from the President (Martin Gurtler) of an AGC member to AGC's then Managing Director concluding that the Government had paid for the quantity survey on a naval construction job obtained by another member (Pl. Ex. 9); minutes of a 1958 meeting of AGC's Quantity Survey Committee in which one member's representative objected to the arrangement with Caraway and indicated that his company included the survey costs in its bids (Pl. Ex. 10); and a series of letters from AGC's former Managing Director to out-of-

state contractors merely describing the arrangement with Caraway (Pl. Ex. 11-14).

On the dues issue, the Government relied on AGC's by-law provision as to dues, which does not state that they are to be included in bids (Pl. Ex. 1, Article 6J); a letter from AGC's former Managing Director to an out-of-state contractor stating that all contractors bidding on a certain project had agreed to abide by AGC's rules (Pl. Ex. 17); minutes of AGC board meetings at which dues for particular projects were fixed at flat amounts (Pl. Ex. 18-20); a series of letters written in 1949 by AGC's former Managing Director to several out-of-state contractors in which he referred to AGC's dues rule and suggested that the addressees take cognizance of these dues in computing their overhead costs for a particular job (Pl. Ex. 21-27); the agenda prepared by AGC's former Managing Director for a 1950 board meeting, one of the items listed on which was a proposal that dues be waived as to jobs bid by non-members, because of the "possible disadvantage" to members of inclusion in their bids of dues not included by non-member bidders (Pl. Ex. 16); a 1950 letter from AGC's former Managing Director to an out-of-state contractor stating that all out-of-state bidders on a certain job had agreed to pay AGC dues, and that this put all bidders on the same footing as far as such dues are concerned (Pl. Ex. 28); a 1950 telegram by AGC's former Managing Director requesting out-of-state bidders on a project to agree in advance to take out membership in AGC if successful (Pl. Ex. 29); a response by an out-of-state bidder agreeing to do so if

the others did so (Pl. Ex. 30); the former Managing Director's reply confirming that the other out-of-state bidders had so agreed (Pl. Ex. 31); the minutes of an AGC board meeting reflecting a similar agreement by two out-of-state bidders on another job (Pl. Ex. 32); and three of the intermediate agreements with Caraway (Pl. Ex. 3, 4 and 6) which required Caraway to increase its fee, if charged to a non-member of AGC, by the amount of AGC dues for the project (the latest, 1957, agreement with Caraway contained no such requirement, Pl. Ex. 7).

It will be noted that the great bulk of this evidentiary material relates solely to AGC's efforts to induce non-member successful bidders on New Orleans jobs to pay AGC dues and quantity survey costs. The complaint does not allege that these efforts were unlawful, and neither the motion for summary judgment nor the judgment itself refers to them. The Government relied on all of this evidence solely as justifying an inference therefrom of the existence of agreements and inducements among AGC, its members and non-member bidders for inclusion of the dues and survey costs in all bids. The only part of the evidence which might actually justify such an inference are the letter from Mr. Gurtler (Pl. Ex. 9) indicating his assumption that all bidders on one job included the survey cost in their bids; the 1949 series of letters by AGC's Managing Director (Pl. Ex. 21-27) suggesting that out-of-state bidders include AGC dues in their bids on a particular project; and the 1950 agenda prepared by the Managing Director (Pl. Ex. 16) indicating "possible disadvantage" to members of inclusion

in their bids of dues not payable by non-member bidders.

In opposition to the motion for summary judgment, the defendant introduced an affidavit by Mr. Gurtler stating that his letter (Pl. Ex. 9) reflected nothing more than an assumption on his part that bidders included the survey cost in their bids along with their other costs (Def. Ex. 53); an affidavit by AGC's former Managing Director stating that when he wrote the 1949 letters and prepared the 1950 agenda he was newly employed and unaware of AGC's policy, dating from the 1940 consent decree, against agreements or inducements for inclusion of dues or survey costs in bids (Def. Ex. 20); minutes of a 1951 AGC board meeting in which the former Managing Director was advised of the AGC policy and instructed to conform to it (Def. Ex. 19); and affidavits by numerous present and former officials of AGC and representatives of all of its members, some of whom have been members since 1947, categorically denying the existence of any agreement or inducement for inclusion of dues or survey costs in bids (Def. Ex. 1, pp. 7-8, Def. Ex. 21, pp. 1-2, Def. Ex. 26-56).

In granting the motion for summary judgment as to the dues and survey costs, the District Court rendered an opinion in which it found that "the evidence presented by the Government admits of but one conclusion, namely that it was a practice of members of the defendant association to include the quantity survey costs in the bid price, regardless of whether such members desired or requested such quantity survey"; that "the combi-

nation between the members as to the quantity survey fee had the purpose and effect of raising prices"; that "the agreement here passed on to the owner, an item in the bid price that may or may not have been required by some of the member contractors"; and that "the effect of the obligatory agreement was to take away an incentive for the contractors to use their own initiative in computing their bids." Appendix, pp. 20-21, below.

On the dues issue, the Court found that "the plaintiff contends the defendant attempts to get all bidders, whether members or not, to agree to include the amount of dues in their bids and does in fact obtain such agreements among the bidders"; and that "it is evident from defendant's own documents, by-laws and admissions that such agreements have been obtained and a concerted understanding does exist". Appendix, pp. 21-22, below.

The Question is Substantial

The Government has persuaded the District Court in this case to render a final summary judgment of perpetual injunction, with its resulting prima facie evidentiary effect under 15 USC §16(a), on the basis of a flying inferential leap from scattered documents dating back as long as 20 years, to a flat finding of the existence of an unlawful agreement and concerted understanding, in the face of opposing affidavits and later documentary evidence tending to invalidate the inferences relied on by the Government and flatly denying the existence of the alleged unlawful agreement.

The judgment below is directly contrary to both the provision of Rule 56(c), FRCP, that summary judgment may be granted only when the evidentiary materials of record disclose "no genuine issue as to any material fact", and this Court's holding that "on summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion". *United States vs Diebold, Inc.*, 369 US 654, 655 (1962).

This Court has led the way in restricting use of the summary judgment procedure to its proper function—decision of legal issues when the relevant facts are undisputed—and in disapproving attempted use of this procedure to short-cut trial of disputed fact issues. *Sartor vs Arkansas Natural Gas Corp.*, 321 US 620 (1944).

Especially in antitrust and other complex cases "where motive and intent play leading roles" and are sought to be inferred from "complicated courses of legislation, contracting and practice", this Court has held that summary judgments may not be granted unless from the record looked at "in the light most favorable to . . . the party opposing the motion", "it is quite clear what the truth is", and the opposing party's contentions have been "conclusively disproved". *Norfolk Monument Co. vs Woodlawn Memorial Gardens*, 394 US 700, 704 (1969); *White Motor Co. vs United States*, 372 US 253, 259 (1963); *Poller vs Columbia Broadcasting System*, 368 US 464, 472-73 (1962); *Kennedy vs Silas Mason Co.*, 334 US 249, 256-57 (1948).

In the rare antitrust case in which summary judgment has been affirmed, this Court has emphasized that it did so either on the basis of "facts which the appellants admitted", or because the opposing party failed to make any showing, by affidavit or otherwise, of disputed fact issues; and has stressed the fact that "such judgments shall not be rendered . . . where there are genuine disputes of fact on material issues", and that "all that is required [to preclude summary judgment] is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Associated Press vs United States;* 326 US 1, 7 (1945); *First National Bank vs Cities Service Co.*, 391 US 253, 288-89 (1968).

In *United States vs Diebold, Inc.*, 369 US 654, 655 (1962), on the Government's appeal, this Court reversed a summary judgment granted against the Government in a civil antitrust case. This Court held:

> "In any event both findings [by the District Court] represent a choice of inferences to be drawn from the subsidiary facts contained in the affidavits, attached exhibits, and depositions submitted below. On summary judgment the inferences, to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion. A study of the record in this light leads us to believe that inferences contrary to those drawn by the trial court might be permissible. The materials before the District Court having thus raised a genuine issue as to ulti-

> mate facts material to the rule of *International Shoe Co. v. Federal Trade Comm'n*, it was improper for the District Court to decide the applicability of the rule on a motion for summary judgment. Fed. Rules Civ. Proc., 56(c)."

It is respectfully submitted that the lower Court's action in the instant case is a clear departure from this Court's holding in *Diebold*. Not only was the District Court presented with a controverted issue of fact, but it failed—as it must—to view the material before it in the light most favorable to the appellant. There has thus been raised a substantial question of departure from Rule 56 and the controlling decisions of this Court. It is, accordingly, proper for this Court to exercise its power of summary reversal as it has done in the past when confronted with a departure from clearly controlling precedents. *United States vs Haley*, 358 US 644 (1959); *Norfolk Monument Co. vs Woodlawn Memorial Gardens*, 394 US 700 (1969).

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APPENDIX.

Opinion of the District Court

CHRISTENBERRY, J.

On January 28, 1964, the United States of America filed a civil suit against the New Orleans Chapter, Associated General Contractors of America, Inc. The complaint alleged that the defendant was in violation of 15 U.S.C.A. §1, the Sherman Act, by being engaged in an unlawful combination and conspiracy in restraint of interstate trade and commerce. The New Orleans Chapter, American Institute of Architects and the Construction Indemnity Association of New Orleans, Inc., not made defendants in this suit, were named as co-conspirators with the defendant in the complaint.

The plaintiff, United States of America, alleges that this combination and conspiracy has consisted of a continuing understanding and concert of action between the defendant and the co-conspirators, the substantial terms of which have been and are:

(a) That Bidding Rule C of defendant's by-laws requiring that members of the Association should boycott and refuse to submit competitive bids on building construction projects for which the owner or architect intends to accept, or in fact accepts, separate bids from subcontractors;

(b) That each member of the defendant Association bidding on building construction proj-

ects in the New Orleans metropolitan area should include quantity survey costs in the bid price, regardless of whether such member desired and requested such quantity survey, and that the successful bidder only should pay those quantity survey costs.

(c) That each member of the defendant Association and non member bidding on any construction project in the New Orleans metropolitan area should include Chapter dues in his bid price, and that the successful bidder only should pay dues to the defendant Association.

On April 30, 1964 the defendant filed an answer denying the plaintiff's charges that it had violated the Sherman Act. It contended that its requirements for members did not have the effects alleged in the complaint. Specifically they answered

1) That its bidding rules were adopted for the purpose of promoting economic, coordinated, harmonious and properly supervised construction work and constituted reasonable and lawful self regulation by members of the defendant.

2) That as a result of a previous civil action in this Court (Civil Action No. 249) between the plaintiff and defendant, a final decree was entered on January 13, 1960 under which members of the defendant were permitted to take into account the element of dues in figuring bids, and this decree gives indemnity as to that bidding practice.

3) That in order to insure harmonious labor relations and to meet the various members' labor contract requirement of using only union labor, it has been necessary, as provided in Bidding Rule C, for members of defendant to contract directly with subcontractors.

On August 15, 1968, the plaintiff filed a motion for summary judgment in accordance with Rule 56(a), (c) and (d), Federal Rules of Civil Procedure. Rule 56(a) provides that a party may file a motion for summary judgment after twenty days have elapsed from commencement of the suit.

Rule 56(c) provides in pertinent part:

> "Motion and Proceedings Thereon . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Rule 56(d) allows the court to:

> ". . . ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. . . . Upon the trial of the action the facts so specified shall be deemed established and the trial shall be conducted accordingly."

It is necessary for this court to decide whether there are any genuine issues of material facts.

I.

BIDDING RULE C

Bidding Rule C of Article 12 of Defendant's by-laws provides:

> "Competitive bids shall not be submitted on any project unless all of the items necessary to complete the job are included in the bid on the general contract. All items entering into the general contractor's bid are to be based upon prices, costs and estimates solicited or otherwise obtained directly by the general contractor from the subcontractors or vendors involved. This Rule is intended to prohibit members from submitting competitive bids in cases where the owner or architect takes bids direct from one or more classifications or subcontractors."

Plaintiff contends that there is no genuine issue of material fact as to Bidding Rule C because it is a combination and conspiracy to engage in a group boycott and is, therefore, a per se violation of the anti-trust laws.

Defendant admits that Bidding Rule C was adopted as part of its by-laws, but it contends that the rule is not illegal per se. In support defendant says that Bidding Rule C is not an agreement to boycott but is a reasonable act of self-regulation adopted for the proper business purpose of promoting economic, coordinated, harmonious and properly supervised construction work.

A group boycott has been construed as "concerted refusals by traders to deal with other traders." Klor's, Inc. v.

Broadway-Hule Stores, Inc., 359 U.S. 207, 212 (1959). It is a group action to coerce third parties to conform to the pattern of conduct desired by the group. Certain group boycotts have been construed as illegal per se under the Sherman Act and, therefore, not susceptible to a defense of explanation of reasonableness. Fashion Originators Guild of America, Inc. v. Federal Trade Commission, 312 U.S. 457 (1941); United States v. Columbia Steel Co., 334 U.S. 495 (1948); Northern Pacific Railway Co. v. United States, 356 U.S. 1 (1958); Klor's, Inc. v. Broadway-Hule Stores, Inc., supra. After reviewing these cases dealing with group boycotts, it is difficult to sustain the plaintiff's contention that Bidding Rule C is a boycott that falls within the per se category.

In Northern, supra, the Court said the policy basis of the Sherman Act is competition. It prohibits "every contract, combination . . . or conspiracy in restraint of trade or commerce among the several states." The Court said that this prohibition has been limited only to those contracts or combinations which "*unreasonably*" (emphasis supplied) restrain competition, citing Standard Oil of New Jersey v. U.S. 221 U.S. 1 (1910) and Chicago Board of Trade v. U.S., 246 U.S. 231 (1917). The Court further defined illegal *per se* violations as those "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."

An agreement to deal on specified terms means refusal to deal on other terms. While it would appear that Bidding

Rule C implies a restraint, it is not clear on its face whether it has an adverse effect on competition and lacks any redeeming virtues. There is a need to hear the evidence as to the underlying reason for the rule and also its effect. In all the cases dealing with group boycotts and the per se rule, economic profit has clearly been the motive and elimination of competition has been the intent. In Fashion, supra, the Court's decision turned on a finding that, "the aim of the plaintiff's combination was the intentional destruction of one type of manufacture and sale which competed with Guild (association) members." In Klor's, supra, there was a concerted refusal by defendants to sell merchandise to plaintiff for resale. Clearly the motive was economic gain at the expense of another. It has been said that the per se rule laid down by the Supreme Court in Klor's will not be followed when economic profit is not the motive of the boycott or where there is justification for the boycott and also that "A boycott rule which is not geared to a cogent test of effect on competition is thus completely unmanageable."

To see whether Bidding Rule C has an effect on competition is important, because as has been stated, the concern of the statute is the protection of competition. There must be an "unreasonable" restraint on competition before the rule in question can be condemned as a per se violation of the statute.

Note: 62 Columbia L.Rev. 475, 490 and note 72. See also "Joint Ventures and Boycotts: Some Suggestions on Per Se" 15 Stanford L.Rev. 638

See Rahl, Per Se Rules and Boycotts under the Sherman Act, 45 Univ. of Va. L. Rev. 1165 at 1172.

In White Motor Co. v. U.S., 372 U.S. 253 (1963) the Court referred to certain group boycotts as "naked restraints of trade with no purpose except stifling of competition." The Court said further that in an area "where motive and intent play leading roles" summary judgment is not appropriate.

Such is the case here. It is not clear whether this rule has such a "pernicious effect on competition and lack of any redeeming virtue" that it should be classified as a per se violation of the Sherman Act. Here the applicable legal principle turns on a rule of reason, and the application of the law is influenced by the shape of the facts as they emerge at trial and should not be applied prematurely in a summary adjudication. Rule C cannot on its face be determined to be a violation of the Sherman Act; there are genuine issues of fact and the motion for summary judgment as it pertains to Bidding Rule C must be denied.

II.

QUANTITY SURVEY FEE

The alleged conspiracy concerning the quantity survey fee arises from the agreements entered into between defendant and the M. H. Caraway Company (hereinafter referred to as "Caraway"). Caraway furnished quantity surveys upon the request of a contractor or an organiza-

A quantity survey is a detailed listing of the items and amounts of material required for construction of a structure, and is used by contractors in calculating bids on given projects although the survey is not concerned with price or cost of the items listed.

tion such as defendant. The plaintiff contends that there was an agreement that each member of the defendant association bidding on building construction projects in the New Orleans metropolitan area should include quantity survey costs in the bid price, regardless of whether such member desired and requested such quantity survey; and that the successful bidder only should pay those quantity survey costs.

Plaintiff supports this contention for summary judgment upon the defendant's answer to the complaint, defendant's amended response to plaintiff's request for admissions, defendant's answer and amended answers to the plaintiff's interrogatories, defendant's by-laws, and plaintiff's documents marked exhibits 1 through 32. The plaintiff contends there is no genuine issue as to any material fact. With this contention we agree. The evidence presented by the Government admits of but one conclusion, namely that it was a practice of members of the defendant association to include the quantity survey costs in the bid price, regardless of whether such members desired or requested such quantity survey; and that the successful bidder only should pay those quantity costs.

Under the Sherman Act, it has been held that "competition, not combination, should be the law of the trade." National Cotton Oil Co. v. Texas, 197 U.S. 115, 129 (1905). Any "combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate commerce is illegal per se." U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940). Once a combination has been construed as illegal

per se under the Sherman Act, it is not susceptible to a defense or explanation of reasonableness. Northern Pacific Railway Co. v. U.S., 356 U.S. 1 (1958).

It is abundantly clear that the combination between the members as to the quantity survey fee had the purpose and effect of raising prices. Such a combination "cripples the freedom of traders and thereby restrains their ability to sell in accordance with their own judgment." Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211 (1951).

The agreement here passed on to the owner an item in the bid price that may or may not have been required by some of the member contractors, who were bidders. The effect of the obligatory agreement was to take away an incentive for the contractors to use their own initiative in computing their bids. Thus an element of competition was affected and there is a lack of any redeeming virtue in making this survey compulsory on the members. As such, there is no genuine issue of material fact here and the motion for summary judgment as pertains to this issue should be and is granted.

III.

CHAPTER DUES

The plaintiff alleges there has been a combination and conspiracy between defendant and co-conspirators that defendant's dues be included in the bid price. The dues, which are paid by members of the defendant and by both member and non-member out-of-state general

contractors, are based upon a percentage of the bid price of each individual job awarded to the bidder. Only the successful bidder pays the dues on a particular job. The plaintiff contends the defendant attempts to get all bidders, whether members or not, to agree to include the amount of dues in their bids and does in fact obtain such agreements among the bidders. It is evident from defendant's own documents, by-laws and admissions that such agreements have been obtained and a concerted understanding does exist. Even though the scope of this unlawful combination is not expressly spelled out in any single agreement, it has long been settled that a conspiracy can be found in the concerted course of action of the parties. U.S. v. Paramount Pictures, Inc., 334 U.S. 131, 142 (1948); Interstate Circuit v. U.S., 306 U.S. 208, 226-227 (1939), U.S. v. Masonite Corp., 316 U.S. 265, 275 (1942).

This is another example of a "combination formed for the purpose and with the effect of raising . . . the price of a commodity in interstate commerce [and] is illegal per se." U.S. v. Socony-Vacuum Oil Co., supra.

The defendant argues that as a result of a previous civil action in this Court (Civil Action No. 249) between the plaintiff and defendant, a final decree was entered on January 13, 1940 under which members of the defendant were permitted to include in bids an amount representing dues in the association and that this decree is res judicata as to that bidding practice. With this we cannot agree.

The per se doctrine had its genesis in U.S. v. Trenton Potteries Co., 273 U.S. 392 (1927). In that case the Court

held that a vertical price-fixing arrangement is a per se violation of the anti-trust laws, and a trial to show its nature, extent, and degree is not necessary. On May 6, 1940, in U.S. v. Socony-Vacuum Oil Co., supra, the Court held that horizontal agreements to raise prices are illegal per se. This holding was followed in Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211 (1951). Thus the extension of the scope of the illegal per se rule came after this Court's decree in Civil Action No. 249 which was entered in the light of what was then thought to be the law. That decree cannot be given the effect of permitting the defendant to violate the law as determined by the Supreme Court after that decree was entered.

For these reasons we find there is no genuine issue of material fact and the motion for summary judgment as pertains to chapter dues should be and is granted.

Finally the issue of whether the acts of defendant substantially affect interstate commerce is raised by the defendant. As to Bidding Rule C, this is a question of fact that must be determined at trial. In regard to the two other issues of quantity surveys and chapter dues included in defendant's members' bid prices, the effect upon interstate commerce is conclusively presumed as we hold them to be per se violations of the Sherman Act. See Las Vegas Merchant Plumbers Assn. v. U.S., 210 F.2d 732, 748 (9th Cir., 1954), cert. den. 348 U.S. 817 (1954); U.S. v. Pennsylvania Refuse Removal Association, 242 F.Supp. 794, 798 (E.D. Pa. 1965), cert. den. 384 U.S. 961 (1966).

Counsel will prepare and present a judgment in conformity with the foregoing.

New Orleans, Louisiana, this 30th day of December, 1968.

s/ HERBERT W. CHRISTENBERRY
UNITED STATES DISTRICT
JUDGE

Partial Final Judgment of the District Court

This matter having come on for a hearing before the Court upon a motion of the plaintiff for summary judgment, counsel for the parties having been heard, and the Court having determined, upon consideration of pleadings, admissions, responses to interrogatories and exhibits on file, that there is no genuine issue between the parties as to any material fact with respect to all of the claims involved in this action other than the claims based on Bidding Rule C of defendant's by-laws, and the Court having filed its opinion herein on December 30, 1968, granting the motion for summary judgment with respect to all claims other than claims based on Bidding Rule C, defendant's motion for re-argument having been denied by order of the Court, on March 28, 1969 and it appearing to the Court that there is no just reason for delay in entering a final judgment in accordance with that decision on all the multiple claims upon which summary judgment has been granted,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED

1

The Court has jurisdiction of the subject matter hereof and of the parties hereto.

II

The defendant New Orleans Chapter, Associated General Contractors of America Inc. has combined and conspired in unreasonable restraint of trade and commerce in violation of Section 1 of the Act of Congress approved July 2, 1890, as amended, commonly known as the Sherman Act (15 U.S.C. 1).

III

IV

The defendant, its successors, officers, directors, representatives, employees, members and all persons acting or claiming to act on behalf of the defendant are hereby perpetually enjoined

From, directly or indirectly, inducing or requiring members of the defendant or members to include in their bids on any building construction project in the New Orleans metropolitan area any charges for

a quantity surveyor

the chapter dues

VI

The defendant shall within sixty days after the entry of this judgment cause to be inserted in the trade magazine "The Constructor" a notice which shall fairly and fully apprise the readers thereof of the substantive terms of this Partial Final Judgment. Said notice shall be repeated in at least three consecutive issues of said trade magazine. Defendant shall file with the Court proof of compliance with this paragraph.

VII

For the purpose of securing or determining compliance with this Partial Final Judgment duly authorized representatives of the Department of Justice shall on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division and on reasonable notice to the defendant made to its principal office be permitted subject to any legal recognized privilege

(a) Reasonable access during office hours of the defendant to all books ledgers accounts correspondence memoranda and other records and documents in the possession or under the control of the defendant relating to any matters contained in this Partial Final Judgment

(b) Subject to the reasonable convenience of the defendant and without restraint or interference from it, to interview officers, employees or members of the defendant, who may have counsel present, regarding any such matters.

Upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, the defendant shall submit such reports in writing with respect to the matters contained in this Partial Final Judgment as may from time to time be requested.

No information obtained by the means permitted in this Section VII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff, except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this Partial Final Judgment or as otherwise required by law.

VIII

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Partial Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Partial Final Judgment, for the modification of any of the provisions contained therein, for the enforcement of compliance therewith and for the punishment of violations thereof.

IX

The plaintiff shall recover the costs of this action.

/s/ HERBERT W. CHRISTENBERRY
United States District Judge

June 24, 1969
Date